



DEC 26 1944

CHARLES ELMORE DROPLEY
CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

JOHN W. HAYS and SARAH R. HAYS,
Petitioners,

vs.

CATHERINE FARRINGTON, PARKER M.
WOODS, WILLIAM L. BECKETT,
WALTER M. WARREN and LYMAN E.
WARREN,

Respondents.

No. 731.

**BRIEF OF RESPONDENTS IN OPPOSITION TO
ISSUANCE OF WRIT OF CERTIORARI.**

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OPINION BELOW.

The opinion of the Supreme Court of Missouri, as yet not officially reported, is reported in 182 S. W. (2d) 186.

JURISDICTION.

The opinion of the Supreme Court of Missouri was delivered, and the judgment entered on July 3rd, 1944 (R. 292 and 305).

The said judgment became final upon the entry of an order on September 5th, 1944, overruling the motion of petitioners for a rehearing and to transfer the cause to the Supreme Court en banc (R. 305-306).

The petition for writ of certiorari filed herein does not contain the "statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question" required by Rule 38, par. 2, of this Court.

The brief filed in support of the petition invokes the jurisdiction of this court under Section 237 (b) of the Judicial Code as amended by act of February 13th, 1925 (43 Stat. 937, 28 U. S. C. 344b). The reference in said brief to jurisdiction is general in terms and fails to specify with particularity the provisions or portions of the statute relief upon by petitioners.

From the argument made in the brief of petitioners, it would appear that their claim of jurisdiction in this court is based upon the ground that a title, right, privilege or immunity under the Fourteenth Amendment to the Constitution of the United States was specifically set up or claimed by them and denied in the court below, it being the contention of the petitioners in their brief that they were denied the equal protection of the law and deprived of their property without due process of law by the decree of the state court.

QUESTIONS PRESENTED.

The petition for writ of certiorari does not contain a statement of the "questions presented" required by Rule 38, par. 2, of this court. Nor does a statement of the "questions presented," eo nomine, appear in the petitioners' brief.

In the view of respondents, the questions presented by the petition for the writ are as follows:

(1) Does this court have jurisdiction to review the judgment of the Supreme Court of Missouri affirming the decree below, awarding to the respondents specific performance of a contract for the conveyance of land against the petitioners to the extent of their interest therein, where such judgment is predicated upon a determination by the state court:

(a) That under the facts and circumstances in evidence an equitable estoppel was operative as to the petitioner, John W. Hays.

(b) That the respondents were not chargeable with notice as a matter of law of the undisclosed interest of petitioner Sarah R. Hays.

(c) That the rights acquired by respondents under a written contract with the holder of the record title were superior to the rights, if any, acquired by petitioner Sarah R. Hays under an unrecorded instrument to which she was not a party and which she had not accepted.

(d) That the Missouri Statutes of Frauds was not applicable.

(2) Does this court have jurisdiction to review the judgment of the Missouri Supreme Court by reason of the fact that the trial court denied relief to the respondents as against co-defendants of the petitioners in respect to the interest of the said co-defendants in the real estate.

STATEMENT OF THE CASE.

The action below was a suit in equity filed by the respondents in the Circuit Court of St. Louis County, Missouri, against Marie Halbrecht, Lloyal M. Burton, Rosalyn R. Burton and the petitioners herein, John W. Hays and Sarah R. Hayes, his wife, to obtain a decree vesting title in the respondents to a tract of land situated in St. Louis County, pursuant to a written contract for the purchase

of said land signed by Catherine Farrington, as the agent and nominee of the other respondents, and by defendant Marie Halbrecht as record owner of said property and H. J. Gannon as agent for the owner.

At the time Marie Halbrecht signed the contract of sale, she was the holder of the record title. After the contract of sale was signed, the petitioner John W. Hays filed for record a deed theretofore executed by Marie Halbrecht conveying the property to Lloyal M. Burton and Rosalyn R. Burton, his wife.

The trial court found the issues in favor of the respondents and against the petitioners and decreed that the respondents were entitled to a conveyance of the interest of the petitioners in the land in question consisting of the western half thereof. The issues were found against the respondents and in favor of the co-defendants, Lloyal M. Burton and Rosalyn R. Burton, and relief was denied to the respondents as against the Burtons and their interest in the property (Decree, R. 271-278).

From this decree the petitioners appealed to the Supreme Court of Missouri. No appeal was taken by the Burtons nor by the respondents.

The decree of the Circuit Court was affirmed by the Supreme Court of Missouri.

The facts are fully and fairly set forth in the opinion rendered by the Supreme Court of Missouri (R. 292-305).

The issues in the trial below as between the respondents and the petitioners were framed upon the second amended petition of the respondents (R. 4-11), the separate answer of petitioner Sarah R. Hays (R. 15-17), the separate answer of petitioner John W. Hays (R. 17-20), and the reply of plaintiffs thereto (R. 20). No federal title, right, claim, privilege, or immunity was asserted by either of the petitioners in their respective answers to the second amended petition of the respondents.

The first reference in the record to any purported federal question appears in the motion of the petitioners for new trial, in the tenth ground thereof, reading as follows (R. 281):

“Defendants say that the judgment of the court deprives them, and each of them, of their property without due process of law, and denies to them, and each of them, the equal protection of the laws, contrary to the Fifth Amendment of the Constitution of the United States and the Fourteenth Amendment thereof, and contrary to the ‘due process’ and ‘equal protection’ clauses of the Constitution of Missouri.”

The motion for new trial was overruled by the trial court without opinion. Upon the appeal to the Supreme Court, the sole reference to a purported federal question in the assignment of errors is found in assignment VIII, reading as follows (R. 290):

“The finding and decree of the court, under the circumstances in evidence in this case, are contrary to the well-settled law of this state, and contrary to its statute of frauds, and, in effect, deprives these appellants of their property rights, without due process of law and denies to them the equal protection of the laws, contrary to the 5th and 14th Amendments of the Constitution of the United States, and contrary to Section 30 of Article II of the Constitution of Missouri.”

The opinion of the Supreme Court does not deal with the alleged federal question and is based upon the following conclusions of the Supreme Court:

(1) The second amended petition stated facts sufficient to constitute a cause entitling the respondents to a decree upon the principles of equitable estoppel (R. 297-300).

(2) Petitioner John W. Hays, by reason of his conduct, was estopped from denying the authority of Marie Hal-

brecht, the record owner, to sign the contract of sale and knowledge by respondents that petitioner John W. Hays had an interest in the property did not operate to prevent the estoppel because John W. Hays actively participated in the sale by Marie Halbrecht (R. 300-302).

(3) Respondents had no knowledge of the interest of petitioner Sarah W. Hays and constructive notice of such interest was not attributable to the respondents because of the fact that the co-defendants, Lloyal M. Burton and Rosalyn R. Burton, were in possession of the premises (R. 302-305).

(4) Respondents were not precluded from obtaining relief against petitioner Sarah R. Hays upon the ground that she had not authorized Marie Halbrecht or H. J. Gannon to sign the contract of sale, or upon the ground that the contract was invalid as to her by reason of the statute of frauds, or upon the ground that there was an absence of mutuality of remedy (R. 303).

(5) That the contract under which petitioner Sarah R. Hays claimed imposed burdens, in addition to benefits, and her acceptance thereof could not be presumed, in view of the fact that she was not a party to said contract and did not furnish any of the consideration (R. 304).

(6) That it was unnecessary to determine the extent of the rights acquired by petitioner Sarah R. Hays because the rights acquired by respondents under a contract with the holder of the record title were superior to the rights, if any, of Mrs. Hays, which were unknown to the respondent (R. 304).

SUMMARY OF THE ARGUMENT.

I.

The petition should be dismissed because it does not comply with Rule 38, par. 2, of the rules of this Court in that it does not contain the required statement of jurisdiction and the required statement of questions presented.

II.

This Court does not have jurisdiction to review the judgment of the Supreme Court of Missouri because:

(a) The judgment of the Missouri Supreme Court is based upon the determination of purely local questions of law.

(b) The alleged error based upon the claim that the Missouri Supreme Court failed to follow well-settled principles of law does not give rise to a federal question.

(c) No federal question arises out of the fact that equitable relief was denied as to co-defendants but granted as against the petitioners.

III.

This Court does not have jurisdiction to review the judgment of the Missouri Supreme Court in the absence of an affirmative showing by the record that a federal question of substance was decided, or that the decision of the federal question of substance was necessary to a determination of the cause.

ARGUMENT.

I.

Rule 38, par. 2 of the Rules of this Court, provides that a petition for the review of the decision of a state court on writ of certiorari shall contain, among other requirements, the following:

“ * * * a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented
* * * ”

The rule further declares that a failure to comply with the requirements thereof will be a sufficient reason for denying the petition.

The petition filed herein does not contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of Missouri, nor does it set forth the questions presented by the application for the writ.

The petition does not refer distinctly to the statutory provisions believed to sustain the jurisdiction of this Court; does not set forth the date of the judgment of the state court; does not show that the nature of the case and the rulings of the state court were sufficient to bring the case within any jurisdictional provisions relied on; does not cite any case or cases believed to sustain the jurisdiction; and does not include a statement of the grounds upon which it is contended that the questions involved are substantial.

Furthermore, the petition does not specifically set forth the various stages at which the attention of the state court was directed to the claimed federal question, nor the rulings of the court thereon.

It is true that in the supporting brief,, the petitioners invoke, as the basis of this court's jurisdiction, Section 237b of the Judicial Code, 43 Stats. 937, 28 U. S. C. 344b (Brief, p. 10).

This reference, however, is general in nature and does not even point out the specific portions of the statute deemed applicable.

This Court has held that the brief is not to be deemed a part of the petition. **General Electric Talking Pictures v. Western Electric Co.**, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849.

The requirements of the rule hereunder discussion are not based upon considerations of mere convenience to this Court. The failure of the petition to substantially comply with the requirements of the rule justifies the denial of the petition.

Under the practice prevailing in the Supreme Court of Missouri, errors assigned but not noticed or relied on in the brief or supported by authority may be disregarded. In **Pence v. Kansas City Laundry Service Co.**, 332 Mo. 930, 59 S. W. (2d) 633, the Supreme Court of Missouri said:

“Counsel for appellant list other assignments of error which they have not seen fit to carry forward under the head of points and authorities except by the most general reference and this without citation of any supporting authorities or any elaboration or discussion whatever in the brief. This is not sufficient compliance with our Rule 15 as entitles these assignments to our consideration on appeal” (59 S. W. [2d], l. c. 639).

We submit it was incumbent upon the petitioners to affirmatively show by the record and in their jurisdictional statement that they had followed the Missouri practice and had effectively preserved in the Missouri

Court their assignment of error as to the alleged federal question by proper presentation in their brief and argument.

In **Hulbert v. City of Chicago**, 202 U. S. 275, 26 S. Ct. 617, 50 L. Ed. 1026, this Court said (202 U. S., l. c. 281):

“Nor was a right under the Constitution of the United States necessarily involved in the determination of the cause. And the supreme court was justified by its rulings in omitting the consideration of rights under the Constitution of the United States. According to the practice of the court, an error not assigned is not open to review. **Berry v. Chicago**, 192 Ill. 154, 155, 61 N. E. 498. Errors assigned but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. **Keyes v. Kimmel**, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. **Erie R. Co. v. Purdy**, 185 U. S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605.”

Had the petitioners set forth in their petition for certiorari the manner in which they presented to the Supreme Court of Missouri the alleged federal question in their printed brief and argument, this Court would have been apprised of the fact that under the points and authorities dealing with the alleged denial of due process and the equal protection of law, petitioners referred merely to the Fifth Amendment of the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of United States, and Section 30 and Article II of the Constitution of Missouri without the citation of a solitary case decided by the court of any jurisdiction. This Court would have been further apprised that under that portion of the argument devoted to the alleged federal question, no authority was cited and the argument consisted of the mere bald conclusions of the petitioners.

II.

This Court has no jurisdiction to review the judgment of the state court which is predicated upon the determination of questions of general principles forming a part of the local law of the state.

In **Brinkerhoff-Faris Trust and Savings Co. v. Hill**, 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451, this Court said:

“It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court’s power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles of doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court” (74 L. Ed. 1113).

The record, and the opinion of the Supreme Court of Missouri indicate clearly that relief was granted to the respondents against the petitioner John W. Hays upon the ground that an equitable estoppel existed by reason of his active participation in the negotiations conducted by Marie Halbrecht and H. J. Gannon for the sale of the property, culminating in the contract signed by Marie Halbrecht as the owner of the record and by Gannon as agent for the owner.

The determination of whether or not the facts and circumstances in the case were sufficient to cause an equitable estoppel to become operative as to the petitioner John W. Hays was purely a question of Missouri law.

It is immaterial so far as the jurisdiction of this Court is concerned whether or not the Supreme Court of Missouri correctly applied the doctrine of equitable estoppel to the facts and circumstances disclosed by the evidence.

This Court has recognized that where a case is tried

by the state court on the ground that an estoppel does or does not exist, jurisdiction to review the decision of the state court is not possessed by this Court. **Beals v. Cones**, 188 U. S. 184, 47 L. Ed. 435, 23 S. Ct. 275; **Weyerhauser v. State of Minnesota**, 176 U. S. 550, 44 L. Ed. 583, 20 S. Ct. 485.

The judgment of the Missouri court to the effect that an equitable estoppel may arise against the owner of real estate in favor of one who purchases from the holder of the record title, by reason of acts or omissions upon the part of the real owner, is in accord with the general law on the subject. (See 31 C.J. Secundum, "Estoppel," Sections 89-90 and 905.)

It is likewise in accord with the decision of this Court in **Kirk v. Hamilton**, 102 U. S. 68, 26 L. Ed. 79, wherein the doctrine was recognized by this court and wherein it was held that a court of equity has jurisdiction to compel the true owner to execute a conveyance where an estoppel is operative as to him.

In the state court, the petitioners alleged, as a defense to the action, the Missouri Statute of Frauds.

Whether or not the Statute of Frauds prevented the operation of the doctrine of equitable estoppel was purely a question of local law. The Missouri Court, in deciding adversely to the petitioner upon that issue, was applying the general rule. (See 50 A. L. R. 685.)

The judgment against petitioner Sarah R. Hays was predicated by the Missouri Court upon the ground that respondents had no notice of her rights under the contract made between her husband and Lloyal M. Burton; that she had not accepted the contract and her acceptance could not be presumed in view of the fact that the contract imposed burdens; and that the rights acquired by the respondents by virtue of their contract with the holder and the record owner were superior to the undisclosed equitable rights, if any, of Sarah R. Hays.

The Supreme Court of Missouri further held that possession by the Burtons under their deed did not constitute constructive notice of any rights that petitioner Sarah R. Hays might have had in and to the real estate.

All of the foregoing rulings were determinable solely upon general principles of law as interpreted by the local court.

Petitioner contends that the decision and judgment of the Supreme Court of Missouri was contrary to well-settled principles of law theretofore adopted by the Missouri court.

Should the truth of this statement be conceded, that fact itself does not create a federal question because no claim based on the Fourteenth Amendment arises out of the fact that a state court has overruled previous decisions. **Patterson v. Colorado**, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556; **Tidal Oil Co. v. Flanagan**, 263 U. S. 444, 68 L. Ed. 382, 44 S. Ct. 97.

A consideration of the only assignment of error made in the Supreme Court of Missouri by the petitioners raising the so-called "federal question" clearly indicates that the real grievance of the petitioners is what they conceive to be the misapplication by the Missouri court of general principles of law in a manner inconsistent with earlier decisions of that court. This assignment of error (R. 290) reads as follows:

"The finding and decree of the Court, under the circumstances in evidence in this case, are contrary to the well-settled law of this state, and contrary to its statute of frauds, and, in effect, deprives these appellants of their property rights, without due process of law and denies to them the equal protection of the laws, contrary to the 5th and 14th Amendments of the Constitution of the United States, and contrary to Section 30 of Article II of the Constitution of Missouri."

It is apparent that the claim that petitioners were deprived of their property rights without due process of law and denied the equal protection of the law is hypothesized upon the premise that the findings and decree of the Court under the circumstances in evidence **in this case** were contrary to the well-settled law of the State of Missouri and contrary to the Missouri Statute of Frauds.

Every disappointed litigant feels that the court in his case has failed to apply the well-settled law of the state to the facts and circumstances in evidence, and if such claim were permitted to form the basis of a claim to protection under the Fourteenth Amendment, the appellate jurisdiction of this Court would be unlimited.

This Court held in **Milwaukee Electric R. W. and Light Co. v. State of Wisconsin**, 252 U. S. 100, 64 L. Ed. 476, 40 S. Ct. 306, that the 14th Amendment does not, in guaranteeing the equal protection of the law, assure uniformity of judicial decisions (252 U. S., l. c. 166).

Petitioners further urge that they are deprived of their property without due process of law and denied the equal protection of the law because of the fact that the judgment below was favorable to their co-defendants, Lloyal M. Burton and Rosalyn R. Burton.

In the Supreme Court of Missouri the petitioners assigned as error in the judgment below the alleged conflict in the decree arising out of the favorable decision to the Burtons, as compared to the adverse decision against the petitioners.

Whether or not the judgment or decree was invalid for conflict was a matter to be determined by the law of the state.

No authority is cited by petitioners in support of their claim that the alleged conflict constitutes the basis of a claim under the Fourteenth Amendment.

The Supreme Court of Missouri did not pass upon the propriety of the judgment as to the co-defendants Lloyal

M. Burton and Rosalyn R. Burton. The Burtons had not appealed from the judgment and the respondents had not appealed from that portion of the decree which was adverse to them. Consequently, there was no occasion for the Supreme Court of Missouri to review the findings and decree of the trial court in respect to the rights of co-defendants whose interests were not involved in the appeal.

Ample ground for distinguishing the difference in result as between the petitioners and as between their co-defendants are disclosed by the record.

The record affirmatively shows that the Burtons had received a conveyance vesting legal title to the property in them prior to the time that the respondents entered into their contract with the holder of the record title.

The Court further found, as a matter of fact, that no grounds for an equitable estoppel existed against the Burtons (R. 275).

Moreover, it appeared from the evidence that the Burtons were in possession of the premises under their unrecorded deed and from that the Court could have readily concluded that the respondents were chargeable with notice of the interest of the Burtons.

The petitioners in their brief herein assert that the Burtons claimed their interest in the real estate under the same contract which gave rise to the claim of Sarah R. Hays.

We have heretofore pointed out the facts and legal considerations which placed the Burtons in a situation different from that occupied by the petitioners.

This Court can only speculate as to the basis of the claims made by the Burtons, since the record does not contain the answer filed by the Burtons. The record, therefore, does not support the assertion made by the petitioners that the Burtons predicated their claim upon the same grounds as did the petitioners; but, on the contrary, the evidence discloses that the Burtons were in a wholly different position.

III.

The mere assertion of a federal title, right, privilege or claim itself does not confer jurisdiction upon this Court.

In **Southwestern Bell Telephone Co. v. Oklahoma**, 303 U. S. 206, 82 L. Ed. 751, 58 S. Ct. 428, this Court said:

“We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it” (82 L. Ed., l. c. 755).

In the case at bar, it is clear that no federal question was actually decided by the Supreme Court of Missouri.

It is likewise clear that the decision of the federal question was not implicit in the decision reached by the Supreme Court of Missouri. The decision of the Court was predicated wholly upon nonfederal grounds.

For the reasons above set out the petition should be denied.

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